

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

77-1336

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

- against -

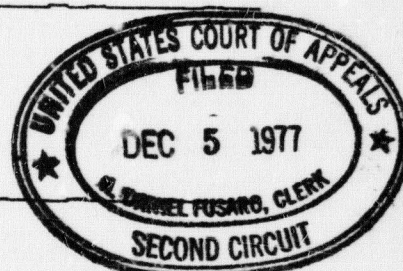
JOSEPH GAMBINO and CARLO CONTI,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

12/5

PETITION OF APPELLANT GAMBINO FOR
REHEARING WITH SUGGESTION FOR RE-
HEARING EN BANC.



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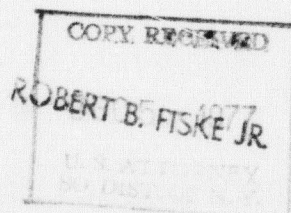


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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT COURT

-----X

UNITED STATES OF AMERICA,

Appellee,

- against -

JOSEPH GAMBINO and CARLO CONTI,

Defendants-Appellants.

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PETITION ON BEHALF OF APPELLANT GAMBINO
FOR REHEARING WITH SUGGESTION FOR RE-
HEARING EN BANC.

PRELIMINARY STATEMENT

This petition is submitted on behalf of the appellant Joseph Gambino in support of his application for rehearing of his appeal with a suggestion that said rehearing be granted en banc. The facts are well-known to this Court and are amply set forth in this Court's opinion of November 21, 1977, which opinion affirmed Gambino's conviction as well as that of his co-defendant, Carlo Conti. We respectfully submit that rehearing should be granted as to Gambino in that the Court may have overlooked or misapprehended certain factors on the original appeal.

After a trial by the Honorable Robert J. Ward, U.S. D.J., sitting without a jury, Gambino was convicted of:

- (1) conspiracy to violate 18 U.S.C. §1962
(18 U.S.C. §371 - Count 1)

- (2) Racketeering (18 U.S.C. §§1962(b) and 2 - Count 2)
- (3) Interference with Interstate Commerce (18 U.S.C. §1951 - Count 3)
- (4) Extortionate collection of credit (18 U.S.C. §894 - Count 4)
- (5) Tax evasion (26 U.S.C. §7201 - Counts 6-9 and 11).

ARGUMENT

This Court initially determined that there was sufficient evidence to warrant appellant's conviction on Counts 1-4. As to Counts 1 and 2, the evidence failed to reveal any participation in illegal activities on the part of Gambino. At best it indicated that he was somehow involved in certain private sanitation work at varying times. However, there was no link of Gambino to any purported violence on the part of Conti. The only incident involving Gambino and any type of violence was one alleged beating of Peter Darminio. However, the Court, in its opinion, did not discuss the significance of this isolated participation in terms of United States v. Amato, 495 F.2d 545 (5th Cir. 1974). That case stands for the accepted proposition that although one may participate in certain acts which are seemingly part and parcel of a conspiracy, even if a person is "an active aggressor" in an assault, this alone is not enough to bring him within the ambit of the conspiracy. More is necessary so as to permit a finding of participation by an individual in a conspiracy beyond a reasonable doubt. United States v. Webb, 359 F.2d 558 (6th Cir. 1966), cert. den. 385

U.S. 824. Neither Gambino's mere association with Conti nor any knowledge of any illegality is enough to sustain his conviction. United States v. Keach, 480 F.2d 1274 (10th Cir. 1973).

The alleged assault by Gambino upon Peter Darminio was not the only point in which knowledge of and participation in an illegal enterprise by Gambino was improperly inferred. An alleged assault by Carlo Conti upon one Louis Mongelli in 1969, prior to the years covered by Counts 1 and 2 of the indictment, was cited by the Court as evidence of the methods employed by Gambino and Conti. Not only did Mongelli deny being struck by Conti, but, more importantly, there was not a scintilla of evidence linking Gambino to this incident or from which any knowledge could be inferred upon his part.

It cannot be overly stressed that during this entire period, the relationship between the Darminios and the appellants was unusual, at best. The evidence at trial indicated that at times they were the best of friends while at others, dispute was rampant. However, this is not to say that such an association can be converted into a federal crime of monumental proportions.

The Court stressed the fact that as part of this scheme, the Darminios were required to pay 1/3 of the gross receipts from the Co-op City stops to Gambino and Conti. The fact that these 1/3 payments had to be made even if the collections by the Darminios, through their company, Terminal Sanitation,

were unsuccessful apparently persuaded the Court to reject the argument that one cannot extort what one owns.* However, such speculation should not be the basis for sustaining a conviction. If, as the evidence showed, the Darminios agreed to pay 1/3 of the monthly receipts, why would it be necessary for the true proprietor of the stops to wait for the Darminios to collect, particularly in view of their highly questionable characters. Not only does this infect the conviction under Count 3 (Hobbs Act), but it also undermines the government's theory as to Counts 1 and 2.

The Hobbs Act conviction, we submit, must fall for an entirely separate reason. Although this Court found that a "casual" effect on interstate commerce is all that is required to sustain a Hobbs Act conviction, the appellant's argument was simply that there was no showing beyond a reasonable doubt of a causal effect on interstate commerce. The basis for this argument is obviously the severe financial straits Terminal found itself in due to the machinations of the Darminios, separate and apart from their involvement with Gambino. Once these other affairs were brought to light, it was incumbent upon the government to establish beyond a reasonable doubt that

* The Court also found that since the argument assertedly was not made below, it was waived for the purposes of appellate review. However, no argument was necessary. No one asserted that the Darminios owned these stops, and the Darminios admitted this on several occasions, as did Ralph Torres, the government's star witness.

any effect on interstate commerce, whether casual or substantial, emanated from the actions of Gambino and not from any other source.

We respectfully submit that the Court should reconsider its opinion of November 21, 1977, and determine that the conviction as to Counts 1-4 should be reversed.

CONCLUSION

For the aforementioned reasons it is respectfully requested that this Court grant rehearing and it is suggested that such rehearing be heard en banc.

Dated: New York, New York
December 5, 1977

Respectfully submitted,

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